STATEMENT OF LEGAL AUTHORITY FOR THE TEXAS NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PROGRAM

As attorney general of the State of Texas, I certify, pursuant to § 402(b) of the Federal Water Pollution Control Act, as amended, 33 U.S.C. §§ 1251-1387 ("CWA"), that in my opinion the laws of the State of Texas provide adequate authority to carry out the program set forth in the "Program Description" submitted by the Texas Natural Resources Conservation Commission ("Commission"). The specific authorities discussed below are contained in lawfully enacted statutes or promulgated regulations, which are in effect as of the date of this statement. In some cases a citation to the current Texas Water Code ("Code") section is accompanied by a parallel citation to a provision with the same section number and title, which includes language that comports with federal requirements, noting "Text of section effective upon delegation of NPDES permit authority." NPDES permits issued by the State of Texas are designated "TPDES" (Texas Pollutant Discharge Elimination System).

Where provisions of the Code of Federal Regulations ("C.F.R.") have been incorporated into the Texas Administrative Code, they are characterized as adopted by reference; adopted by incorporation with full text (meaning that the exact language of the C.F.R. provision has been repeated in the applicable Texas Administrative Code section); or adopted with amendments (meaning that the language of the C.F.R. provision has been repeated in the applicable Texas Administrative Code section with some changes, generally explained in the "Remarks" section). Where no remarks are provided, the state and Federal statutes or regulations have identical or substantially the same language.

1. PARTIAL PROGRAM SCOPE – COMMISSION AND RAILROAD COMMISSION OF TEXAS

State law provides authority for the Commission to regulate a major category partial permit program, consistent with § 402(n)(3) of the CWA. The Commission's program is a complete permit program that covers all of the discharges under the Commission's jurisdiction and represents a significant and identifiable part of the state program required by § 402(b) of the CWA. The TPDES program administered by the Commission covers all discharges except for those beyond the Commission's statutory authority or territorial

jurisdiction. The only Texas discharges subject to regulation under the federal NPDES program but not the TPDES program administered by the Commission are:

a. discharges associated with exploration, development, and production of oil or gas or geothermal resources, as described in Code § 26.131, "Duties of Railroad Commission," including discharges associated with the following:
   (1) drilling injection water source wells which penetrate the base of useable quality water;
   (2) drilling cathodic protection holes associated with the cathodic protection of wells and pipelines subject to the jurisdiction of the Railroad Commission;
   (3) gasoline plants, natural gas or natural gas liquids processing plants, pressure maintenance plants, or repressurizing plants;
   (4) underground natural gas storage facilities under § 91.171-.184 of the Texas Natural Resources Code;
   (5) underground hydrocarbon storage facilities, defined at § 91.201(1) of the Texas Natural Resources Code;
   (6) storage, handling, reclamation, gathering, transportation, or distribution of oil or gas prior to the refining of such oil or prior to the use of such gas in any manufacturing process or as a residential or industrial fuel;

b. discharges otherwise regulated by the Railroad Commission under § 91.101 of the Texas Natural Resources Code, which provides for rules and orders relating to the drilling of exploratory wells and oil and gas wells or any purpose in connection with them, the production of oil and gas, and the operation, abandonment, and proper plugging of such wells;

c. discharges of point source storm water runoff from cultivated or uncultivated range land, pasture land, and farmland; and

d. discharges to waters on Indian lands.

The Commission would regulate discharges associated with uranium ore only to the extent that such regulation is not federally preempted under, for example, the federal Atomic Energy Act of 1954, as amended, 42 U.S.C.§ 2011 *et seq*. ("AEA").[1] Code § 26.027(a) (Text of section effective upon delegation of NPDES permit authority) prohibits the Commission from issuing permits authorizing the discharge of radiological warfare agents or high-level radioactive waste.[2]

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1. While the federal NPDES program excludes radioactive materials regulated under the AEA, *see* 40 C.F.R. § 122.2 (definition of "pollutant" excepts those regulated under the AEA), the Texas definition of "pollutant" under Code § 26.001(13) (Text of section effective upon delegation of NPDES permit authority) does not mention such materials as being either included or exc

2. The Texas Department of Health has exclusive jurisdiction to license "disposal of by-product material." *See* TEXAS HEALTH & SAFETY CODE ANN. §§ 401.412(b),-.2625, -.261(1). (The first two of these provisions were amended in 1997. The third, § 401.261(1), provides that whereas the normal

Federal authority: CWA §§ 402(l)(1), 402(n)(3), 402(b) and 502(14) , 42 U.S.C. § 2011 *et seq.*

State statutory and regulatory authority: TEXAS WATER CODE ANN. §§ 26.001, 26.027, 26.121, 26.131 (Vernon 1988 & Supp. 1998); TEXAS NAT. RES. CODE ANN. §§ 91.101, 91.201 (Vernon Supp. 1998); TEXAS HEALTH & SAFETY CODE ANN. Chapter 401 (Vernon 1992 & Supp. 1998).

Remarks: The Commission has the necessary jurisdiction to regulate all activities from point sources subject to the TPDES program, including storm water permits. Generally, Code § 26.121 (Text of section effective upon delegation of NPDES permit authority) prohibits any discharge of pollutants into or adjacent to waters in the state except as authorized by the Commission. Exceptions to this general rule are provided at Code § 26.131(a)(1)-(3), which makes the Railroad Commission solely responsible for regulating discharges listed in section 1.a., *supra*. Likewise, Code § 26.131(a)(1) and Chapter 401 of the Texas Health and Safety Code make the Railroad Commission and the Commission responsible for regulating certain discharges associated with uranium exploration. Agricultural point source runoff to which section 1.c., *supra*, refers is mentioned

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§ 401.003(3) definition of by-product material includes both material produced or rendered radioactive in reactors and uranium mine and mill tailings, for § 401.2625 purposes the definition *excludes* material produced or rendered radioactive in reactors and thus covers only tailings.) "Disposal" would appear to include by a discharge route. The tailings part of the by-product material definition, *id*. § 401.003(3)(B), covers "tailings or wastes produced by or resulting from extraction or concentration of uranium . . . from ore processed primarily for its source material content, *including discrete surface wastes resulting from uranium solution extraction processes*" (emphasis added). Thus, assuming the phrase "tailings or wastes," or the phrase "discrete surface wastes," or both phrases, cover surface water discharges, the Texas Department of Health has exclusive jurisdiction over licensing with respect to discharges associated with uranium solution extraction processes. (Solution mining is the most common kind of uranium mining that occurs in Texas. No active uranium surface mines exist in the state. If one did exist, surface wastes from it also probably would be under exclusive Texas Department of Health jurisdiction.)

Discharges associated with uranium exploration, as distinct from mining, would meet § 401.003(3)(B)'s definition of by-product material if they were deemed "tailings or wastes produced by or resulting from extraction or concentration of . . . uranium . . . ore" — categories that might not extend to wastes resulting merely from *exploration*. Probably the dispositive issue would be the scope of the words, "resulting from extraction." If the Texas Department of Health did not have jurisdiction over them, the Commission would regulate them because of its general TEXAS HEALTH & SAFETY CODE ANN. § 401.412(a) power over radioactive substance disposal.

The precise division of jurisdiction is under discussion in the on-going negotiation aimed at updating of a Memorandum of Understanding ("MOU") between the Commission and the Texas Department of Health. The MOU's current version is at 30 TEXAS ADMIN. CODE § 336.11.

in an exception to the definition of "pollutant" at Code § 26.001(13) (Text of section effective upon delegation of NPDES permit authority). Irrigation tail water discharges are also included in that exemption, consistent with CWA §§ 402(l)(1) and 502(14). The State of Texas has no territorial jurisdiction over Indian lands for the purpose of regulating discharges of pollutants to waters on Indian lands.

2. AUTHORITY TO ISSUE PERMITS

a. Existing and New Point Sources

Except for discharges noted in Section 1., *supra*, which are beyond the Commission's regulatory jurisdiction, state law provides authority to issue permits for the discharge of pollutants by existing and new point sources to the same extent as the permit program administered by the United States Environmental Protection Agency ("EPA") under CWA § 402. The Commission presently is authorized to regulate all point source storm water discharges. Code § 26.121(d) (Text of section effective upon delegation of NPDES permit authority) provides that no person may discharge, among other things, any pollutant from any point source into any water in the state, except as authorized by a rule, permit, or order issued by the Commission. Code § 26.001(21) (Text of section effective upon delegation of NPDES permit authority) defines "point source" to mean any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft from which pollutants are or may be discharged into or adjacent to any water in the state. Section 26.001(13) (Text of section effective upon delegation of NPDES permit authority) provides the definition of "pollutant" and excludes only "tail water or runoff water from irrigation" or "rainwater runoff from . . . farmland." These definitions correspond to 40 C.F.R. § 122.3, which states that the following discharges do not require NPDES permits: any introduction of pollutants from non-point source agricultural activities, including storm water runoff from orchards, cultivated crops, pastures, and range lands; and return flows from irrigated agriculture.

Federal authority: CWA §§ 301(a), 402(a)(1), 402(b)(1)(A); 40 C.F.R. §§ 122.3, 122.21(a), 122.28, 122.41.

State statutory and regulatory authority: TEXAS WATER CODE ANN. §§ 5.101, 5.105, 7.251, 26.001(13), 26.027, 26.040, 26.121 (Vernon 1988 & Supp. 1998); 30 TEXAS ADMIN. CODE §§ 70.7, 305.22, 305.23, 305.25, 305.533, Chapter 321.

Remarks: Code § 26.027 (Text of section effective upon delegation of NPDES permit authority) states that the Commission may issue permits for the discharge of waste or pollutants into or adjacent to water in the state. Code § 26.121(d) (Text of section effective upon delegation of NPDES permit authority) makes any such discharge not authorized by the Commission via rule, permit, or order a violation of the Code. 30 TEXAS ADMIN. CODE § 305.533 specifically allows the Commission to assume jurisdiction over NPDES permits.

The only statutory defense to unauthorized discharge of a pollutant is contained at Code § 7.251, which provides that if an event that would otherwise be a violation of statute, rule, order or permit was caused solely by an act of God, war, strike, riot, or other catastrophe, the event is not a violation of that statute, rule, order, or permit. As provided by 30 TEXAS ADMIN. CODE § 70.7, any pollution, or any discharge of waste without a permit or in violation of a permit, shall not constitute a violation if the pollution or discharge is the result of causes which are outside the control of the permittee or the permittee's agents and could not be avoided by the exercise of due care. Such acts include, but are not limited to, an act of God, war, strike, riot, or other catastrophe. This rule is consistent with the Legislature's intent that owners and operators of discharging facilities not be liable for discharges caused by natural catastrophe or third parties. 30 TEXAS ADMIN. CODE § 70.7 does not insulate such third parties from liability. Because the Legislature may not be presumed to have intended to sanction the consequences of otherwise unlawful acts included as defenses, e.g., riot, this is also consistent with the intent underlying Code § 7.251.

In responding to comments on proposed rules, the Commission has compared 30 TEXAS ADMIN. CODE § 70.7 to the upset defense embodied in 40 C.F.R. § 122.41(n), but this does not mean the defenses are identical. The federal upset and state *force majeure* defenses overlap, but address somewhat different

concerns and are not coextensive. 40 C.F.R. § 122.41(n) provides an affirmative defense only when noncompliance with a permit's technology-based effluent limitations is "beyond the reasonable control" of the permittee, in part addressing an issue arising from minor statistical anomalies in EPA's regulatory development methodologies. *See Marathon Oil Co. v. Environmental Protection Agency*, 564 F.2d 1253 (9th Cir. 1977). The Court in *Marathon Oil* required EPA to write in formal "upset" provisions in its permits if the permittee using best available control technology currently available would not be able to reach 100 per cent compliance with permit limits. *Id.* at 1273. The Commission's *force majeure* provision is at least as stringent as the federal upset provision because the *force majeure* defense is not simply available as a response to mechanical problems, but is an affirmative defense that must be pleaded and proved before a permittee can avert liability for a non-compliance event. Code § 7.251 and 30 TEXAS ADMIN. CODE § 70.7 provide an affirmative defense to an unauthorized discharge, but only if it is the result of causes that are outside the control of the permittee or the permittee's agents and could not be avoided by the exercise of due care. The state defense is thus analogous to a federal defense that CWA § 301(a) only applies to any person causing an unauthorized discharge, not to the upset defense.

Discharges authorized by rule include those permitted by 30 TEXAS ADMIN. CODE Chapter 321 and any NPDES general permits the Commission may adopt by reference in the future. Texas House Bill 1542 (1997), amending Code § 26.040, gives the Commission power to issue general permits. It also keeps in place agency rules authorizing certain discharges, and allows amendment of these rules to comply with NPDES requirements. The Commission may also adopt appropriate EPA general permits. Alternatively, individual permits can be issued for a discharge when regulation by rule or general permit is not appropriate. 30 TEXAS ADMIN. CODE § 321.141 adopts by reference 40 C.F.R. § 122.28 relating to General Permits, excepting §§ 122.28(b)(ii) [sic][3] and 122.28(c) (relating to oil and gas matters regulated by the Railroad

3. 30 TEXAS ADMIN. CODE § 321.141 contains a clerical error. The provision was adopted stating that its exemptions included § 122.28(b)(ii) when it should have stated the citation to § 122.28(b)(2)(ii). The Commission will republish as needed to correct this error.

Commission). In accordance with the authority in 30 TEXAS ADMIN. CODE § 305.533, the Commission will assume and administer the EPA-issued general permit relating to petroleum bulk stations and terminals immediately after program assumption. In accordance with the authority in 30 TEXAS ADMIN. CODE § 305.533, the Commission will also assume authority over the EPA-issued general permits regarding concentrated animal feeding operations ("CAFOs") after authorization, and after amendment of the Commission's Chapter 321 rules and issuance or amendment of general permits, as appropriate, to fulfill NPDES requirements. [4] The Commission will assume jurisdiction to renew the EPA-issued storm water general permits as they expire. In accordance with the 1997 legislation enacting the new version of Code § 26.040, the following rules may be either repealed and replaced by a general permit or amended to authorize discharges to water in the state subject to NPDES requirements: Subchapters E, F, G, H, J, L, and O of Chapter 321.

The Commission has amended 30 TEXAS ADMIN. CODE §§ 305.22, 305.23, 305.25 and 305.535 to provide that discharges constituting bypass of TPDES treatment facilities may be authorized by temporary or emergency order into waters in the state only if the Commission finds that the order is necessary to prevent loss of life, serious injury, or severe property damage. Further, bypasses may occur without a Commission order at TPDES facilities if necessary for maintenance to assure efficient operations, but only if permit limits are not exceeded. The Commission has amended the definition of "severe property damage" in its rules to

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4. On November 25, 1997, a Travis County, Texas, district judge wrote an opinion letter expressing the view that the Chapter 321, Subchapter K, rules are invalid because of the Commission's failure to comply with a Texas Administrative Procedure Act procedural requirement for rulemaking. The letter said, "Because the order adopting the rule fails, all authorizations issued pursuant to the rule adopted by the order are invalid." No final court order has been signed or filed as of the date of this Attorney General Stateme

In the 1997 session, the Texas Legislature significantly amended Code § 26.040. The Subchapter K rules were partly based on the pre-amendment version of that section. In its new manifestation, the section would not support issuance of the Subchapter K rules, but the legislation enacting it contained a grandfather clause, allowing the Commission to keep them in force and amend t

Section 26.040's new version allows the Commission to issue general permits for facilities, including CAFOs, except that the category of discharges covered by a general permit must not include a discharge of more than 500,000 gallons into surface waters during any 24-hour period.

The Chapter 321, Subchapter B, rules, which also authorize CAFO permitting, were not discussed in the judge's opinion letter, will not be invalidated by any court order, and are capable of being amended by the Commission to comply with federal requirements and thus to be available to applicants for TPDES authorizations to build and operate concentrated animal feeding operatio

exclude "severe economic losses caused by delays in production," to mirror the federal regulatory definition of "severe property damage." These amendments render Texas' temporary and emergency order provisions the equivalent of bypass regulations contained in 40 C.F.R. § 122.41(m), because such orders may be authorized only under circumstances which would justify bypass under that regulation and under 30 TEXAS ADMIN. CODE § 305.535.

b. Disposal Into Wells

State law provides authority to issue permits to control the disposal of pollutants into wells.

Federal authority: CWA §§ 301(a), 402(a)(1), 402(b)(1) (D); 40 C.F.R. §§ 123.28, 147.2200; 42 U.S.C. §§ 300f to 300j-26; 42 U.S.C. §§ 6901-92k; 42 U.S.C. §§ 9601-75.

State statutory and regulatory authority: TEXAS WATER CODE ANN. § 27.011 (Vernon 1988); 30 TEXAS ADMIN. CODE Chapter 331.

Remarks: The EPA has previously authorized the Commission to issue permits for Class I, III, and V wells, under the Underground Injection Control program described in Part C of the federal Safe Drinking Water Act, 42 U.S.C. § 300f-300j-26. Class II wells, for disposal of oil and gas waste, are regulated by the Railroad Commission. Class IV wells, for injection of hazardous fluids or radioactive waste, are prohibited, except for reinjection of ground water that has been treated as part of an approved remediation project under the federal Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-92k., or the federal Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-75.

c. Sludge Disposal

State law provides authority to issue permits for the discharge or disposal of sewage sludge.

Federal authority: CWA § 405; 40 C.F.R. Part 503.

State statutory and regulatory authority: TEXAS WATER CODE ANN. §§ 26.001, 26.027, 26.121 (Vernon Supp. 1998); TEXAS HEALTH & SAFETY CODE ANN. §§ 361.003, 361.011, 361.017, 361.024, 361.061 (Vernon Supp. 1998); 30 TEXAS ADMIN. CODE §§ 305.121, 305.536, 332.31-332.38, Chapter 312.

Remarks: Code § 26.027 (Text of section effective upon delegation of NPDES permit authority) states that the Commission may issue permits for the discharge of waste or pollutants into or adjacent to water in the state. The definition of "pollutant" at Code § 26.001(13) (Text of section effective upon delegation of NPDES permit authority) includes "sewage sludge." Code § 26.121 (Text of section effective upon delegation of NPDES permit authority) makes it unlawful to discharge municipal waste into or adjacent to any water in the state. Code § 26.001(6) (Text of section effective upon delegation of NPDES permit authority) defines "waste" as including sewage and municipal waste, and defines "municipal waste" as including solid substances that result from any discharge from a publicly owned sewer system, treatment facility, or disposal system, i.e., sludge. The definition of "discharge" at Code § 26.001(20) (Text of section effective upon delegation of NPDES permit authority) includes "allow to seep, or otherwise release or dispose of . . . ." Under Code § 26.001(5) (Text of section effective upon delegation of NPDES permit authority), "water in the state" includes both ground water and surface water. Hence, generators of sewage sludge may not allow it to seep or otherwise release into surface or ground waters except in accordance with the conditions of their TPDES permits.

30 TEXAS ADMIN. CODE Chapter 312 adopts the requirements in 40 C.F.R. Subparts 503 A-D, with some additional administrative and management requirements related primarily to registrations, fees, nuisance prevention and transporter regulation. Section 312.101 adopts 40 C.F.R. Part 503, Subpart E by reference except to the extent that it is less stringent than the Code or the rules of the Commission.

3. AUTHORITY TO DENY PERMITS IN CERTAIN CASES

State law provides authority to ensure that no permit will be issued in any case where:

a. The permit would authorize the discharge of a radiological, chemical, or biological warfare agent or high-level radioactive waste;

b. The permit would, in the judgment of the Secretary of the Army acting through the Chief of Engineers, result in the substantial impairment of anchorage and navigation of any waters of the United States;

c. The permit is objected to in writing by the Administrator of EPA, or his designee, pursuant to any right to object provided to the Administrator under CWA § 402(d);

d. The permit would authorize a discharge from a point source which is in conflict with a plan approved under CWA § 208(e); or

e. The issuance of the permit would otherwise be inconsistent with the CWA or regulations promulgated thereunder.

Federal authority: CWA §§ 208(e), 301(f), 402(b)(6), 402(d)(2); 40 C.F.R. §§ 122.4, 123.29, 123.44.

State statutory and regulatory authority: TEXAS WATER CODE ANN. §§ 16.233, 26.017, 26.027(a), 26.037(e), 26.0282, 26.084, 26.121(a)(2)(Vernon 1988 & Supp. 1998); 30 TEXAS ADMIN. CODE § 305.538.

Remarks: Code § 26.027(a) affirmatively prohibits the issuance of a permit authorizing the discharge of any radiological, chemical, or biological warfare agent or high-level radioactive waste. The same Code section authorizes the Commission to deny permits which would violate any federal law, or regulation, e.g., CWA §§ 208(e) and 402(d). One purpose of the Code is to govern issuance of TPDES permits. Moreover, Code § 26.037(e) specifically authorizes the Commission to use an approved water quality management plan in reviewing and making determinations on permits, and Code § 26.084(a)(2) specifically authorizes denial of any permit in conflict with area-wide waste treatment management plans. Code § 26.017 requires the Commission to confer and cooperate with federal agencies, including the Corps of Engineers, in performing its permitting duties. Code § 16.233 further encourages the Commission to cooperate with federal agencies in performing permitting duties. To aid in implementing these statutory authorities, the Commission has adopted 30 TEXAS ADMIN. CODE § 305.538, which provides that no permit may be issued under the conditions prohibited by 40 C.F.R. § 122.4.

4. AUTHORITY TO APPLY FEDERAL STANDARDS AND REQUIREMENTS

a. Effluent Standards and Limitations and Water Quality Standards

State law provides authority to apply in terms and conditions of issued permits applicable federal effluent standards and limitations and water quality standards promulgated or effective under the CWA, including:

a. Effluent limitations under CWA § 301;

b. Water quality related effluent limitations under CWA § 302;

c. National standards of performance under CWA § 306;

d. Toxic and pretreatment effluent standards under CWA § 307;

e. Ocean discharge criteria under CWA § 403.

Federal authority: CWA §§ 208(e), 301(b), 301(e), 302, 303, 304(d), 304(f), 306, 307, 402(b)(1)(A), 403, 501(c), and 510; 40 C.F.R. § 122.44, and Subchapter N.

State statutory and regulatory authority: TEXAS WATER CODE ANN. §§ 5.102, 7.302, 26.023, 26.027(a), 26.029, 26.047 (Vernon 1988 & Supp. 1998); 30 TEXAS ADMIN. CODE §§ 305.531, 305.541.

Remarks: Code § 26.027(a) (Text of section effective upon delegation of NPDES permit authority) authorizes the Commission to deny any permit which would violate state or federal law, rule, or regulation, thus implicitly authorizing imposition of permit conditions necessary for compliance with both federal and state law. *See also,* Code § 5.102. A TPDES permit which failed to include conditions stringent enough to implement applicable federal effluent limitations, national standards of performance, water quality standards, or toxic and pretreatment standards would violate a federal law, i.e., CWA § 501(c). Likewise, a TPDES permit authorizing discharges to the territorial sea, contiguous zone, or Gulf of Mexico would violate CWA § 403(a) unless it assured compliance with ocean discharge criteria promulgated under § 403(c). Accordingly, the Commission is authorized to implement applicable federal standards, limitations, and requirements in connection with its broad authority to impose permit conditions and pretreatment requirements under Code §§ 26.029 (Text of section effective upon delegation of NPDES permit authority), 7.302 and 26.047 (Text of section added effective upon delegation of NPDES permit authority), except when more stringent parallel state requirements also apply. To aid in its exercise of that authority, the Commission

has incorporated by reference 40 C.F.R. § 122.44 in 30 TEXAS ADMIN. CODE §§ 305.531(3) and Subchapter N (except Part 403)[5] in 30 TEXAS ADMIN. CODE § 305.541.

b. Effluent Limitations Requirements of CWA §§ 301 and 307

In the absence of formally promulgated effluent standards and limitations under CWA §§ 301(b) (Effluent limitations) and 307 (Toxic and pretreatment effluent standards), state law provides authority to apply in terms and conditions of issued permits effluent limitations to achieve the purposes of these sections of the CWA using the permitting authority's best professional judgment. Such limitations may be based upon an assessment of technology and processes as required under the CWA with respect to individual point sources, and include authority to apply:

a. To existing point sources, other than publicly owned treatment works ("POTWs"), effluent limitations based on application of the best practicable control technology currently available, the best conventional pollutant control technology, or the best available technology economically achievable;

b. To POTWs, effluent limitations based upon the application of secondary treatment; and

c. To any point source, as appropriate, effluent standards or prohibitions designed to prohibit the discharge of toxic pollutants in toxic amounts or to require pretreatment of pollutants which interfere with, pass through, or otherwise are incompatible with the operation of POTWs.

Federal authority: CWA §§ 301, 304(d), 307, 402(a)(1), 402(b)(1)(A); 40 C.F.R. § 122.44 and Part 125.

State statutory and regulatory authority: TEXAS WATER CODE ANN. §§ 5.102, 26.023, 26.027, 26.029, 26.047, 26.1211 (Vernon 1988 & Supp. 1998); 30 TEXAS ADMIN. CODE §§ 50.17, 305.123, 305.531(3), 308.1.

Remarks: The Commission has adopted 40 C.F.R. Part 125, Subpart A, by reference in 30 TEXAS ADMIN. CODE § 308.1, and 40 C.F.R. § 122.44, by reference in 30 TEXAS ADMIN. CODE § 305.531(3), as part of its rules in effect on the date of TPDES program authorization.

c. Schedules of Compliance

5. Most of 40 C.F.R. Part 403 is adopted by reference in 30 TEXAS ADMIN. CODE § 315.1.

State law provides authority to set and revise schedules of compliance in issued permits which require the achievement of applicable effluent standards and limitations within the shortest reasonable time consistent with the requirements of the CWA. This includes authority to set interim compliance dates in permits which are enforceable without otherwise showing a violation of an effluent limitation or harm to water quality.

Federal authority: CWA §§ 301(b), 303(e), 304(b), 306, 307, 402(b)(1)(A), 502(11), 502(17); 40 C.F.R. §§ 122.47, 122.62, 122.63.

State statutory and regulatory authority: TEXAS WATER CODE ANN. §§ 7.302, 26.029 (Vernon Supp. 1998); 30 TEXAS ADMIN. CODE §§ 305.62, 305.127(3), and 307.2(f).

Remarks: The Commission has incorporated the requirements of 40 C.F.R. § 122.47(a)(1)-(3) into 30 TEXAS ADMIN. CODE § 305.127(3). Reporting requirements set out in 40 C.F.R. § 122.47(a)(4) are treated equivalently by 30 TEXAS ADMIN. CODE § 305.127(3)(C).

The Commission has adopted 40 C.F.R. § 122.62, with certain variations, as part of its rules in effect on the date of TPDES program authorization. 40 C.F.R. § 122.62(a)(4) specifically addresses revisions of compliance schedules in permits. Under state and federal law such revisions are accomplished by permit amendments. 30 TEXAS ADMIN. CODE § 305.62(d) authorizes the Executive Director of the Commission to initiate an amendment to a permit without limitation as to what grounds constitute good cause, and revision of a compliance schedule is a "change in a [permit] term, condition, or provision [which] requires an amendment," under 30 TEXAS ADMIN. CODE § 305.62(a). In addition, Code § 7.302 authorizes the Commission to revoke, suspend, or revoke and reissue a permit on any of a variety of grounds including "violating any term or condition of the permit, [if] revocation, suspension, or revocation and reissuance is necessary in order to maintain the quality of water . . . in the state, or to otherwise protect human health and the environment consistent with the objectives of the statutes or rules within the commission's jurisdiction . . . ."

d. Variances

State law provides authority for the Commission to review and act upon variances from otherwise applicable effluent limitations. To the extent it will consider variances, the Commission's regulatory requirements are as stringent as federal requirements. State law does not allow any variances or adjustment to permit limitations not authorized by federal law.

Federal authority: CWA §§ 301, 302; 40 C.F.R. §§ 122.21(m)-(o), 124.62.

State statutory and regulatory authorities: TEXAS WATER CODE ANN. § 26.027 (Vernon 1988) ; 30 TEXAS ADMIN. CODE § 305.129.

Remarks: The Commission has adopted 30 TEXAS ADMIN. CODE § 305.129, incorporating 40 C.F.R. § 122.21(m)-(o) and 124.62, by reference as part of its rules in effect on the date of TPDES program authorization.

5. AUTHORITY TO LIMIT DURATION OF PERMITS

State law provides authority to limit the duration of permits to a fixed term not exceeding five years. State law provides for the automatic continuance of expired permits, if the permittee files a timely and complete application for a new permit, until such time as a final determination is rendered on the application for renewal.

Federal authority: CWA § 402(b)(1)(B); 40 C.F.R. §§ 122.6, 122.46.

State statutory and regulatory authority: TEXAS WATER CODE ANN. §§ 26.029(a), 26.040 (Vernon Supp. 1998); 30 TEXAS ADMIN. CODE §§ 305.63(a)(4), 305.125(2), 305.127(1)(C); TEX GOV'T CODE ANN. § 2001.054(b) (Vernon Pamph. 1998).

Remarks: The Commission has adopted 30 TEXAS ADMIN. CODE § 305.127(1)(C)(i) limiting TPDES permits to a term not to exceed five years, as part of its rules in effect on the date of TPDES program authorization.

6. AUTHORITY TO APPLY RECORDING, REPORTING, MONITORING, ENTRY, INSPECTION, AND SAMPLING REQUIREMENTS, INCLUDING IN RELATION TO POTWS

State law provides authority to:

a. Require any permit holder or industrial user of a POTW to:
   (1) Establish and maintain specified records;
   (2) Make reports;
   (3) Install, calibrate, use, and maintain monitoring equipment or methods (including, where appropriate, biological monitoring methods);
   (4) Take samples of effluents (in accordance with such methods, at such locations, at such intervals, and in such manner as may be prescribed); and
   (5) Provide such other information as may reasonably be provided.

b. Enable an authorized representative of the state, upon presentation of such credentials as are necessary, to:
   (1) Have a right of entry to, upon, or through any premises of a permittee or of an industrial user of a POTW in which premises an effluent source is located or in which any records are maintained;
   (2) At reasonable times have access to and copy any records required to be maintained;
   (3) Inspect any monitoring equipment or method which is required; and
   (4) Have access to and sample any discharge of pollutants to state waters or to POTWs resulting from the activities or operations of the permittee or industrial user.

Federal authority: CWA §§ 308(a), 402(b)(2) and (9); 40 C.F.R. §§ 122.41, 122.42, 122.44, and 122.48.

State statutory and regulatory authority: TEXAS WATER CODE ANN. §§ 26.014, 26.015, 26.047 (Vernon 1988 & Supp. 1998); 30 TEXAS ADMIN. CODE §§ 305.22, 305.64, 305.125(6)-(12) and (19), 305.126, 305.127(2) and (3), 305.531(1) and (3), 319.1 - 319.12.

Remarks: The Commission has adopted 40 C.F.R. §§ 122.42 and 122.44, by reference, as part of its rules in effect on the date of TPDES program authorization. 30 TEXAS ADMIN. CODE § 305.125(10) specifies that the reference to observance of a facility's safety rules in Code § 26.014 (Text of section effective upon delegation of NPDES permit authority) is not grounds to limit the Commission's authority to enter any part of a facility, but merely a description of the Commission's duty to observe appropriate rules and regulations during an inspection. This reasonable interpretation of § 26.014 is consistent with legislative intent.

30 TEXAS ADMIN. CODE § 305.125(10) cites 40 C.F.R. § 122.41(i) as one of the laws governing inspection and entry of a facility. 30 TEXAS ADMIN. CODE § 305.125(11) includes the same requirements as 40 C.F.R. § 122.41(j)(1)-(3). The requirements of 40 C.F.R. § 122.41(j)(4) are included in 30 TEXAS

ADMIN. CODE §§ 319.11-.12. 30 TEXAS ADMIN. CODE § 305.127(2) includes the same requirements as 40 C.F.R. § 122.48.

7. AUTHORITY TO REQUIRE NOTICE TO THE COMMISSION OF INTRODUCTION OF POLLUTANTS INTO PUBLICLY OWNED TREATMENT WORKS

State law provides authority to require in permits issued to POTWs conditions requiring the permittee to give notice to the Commission of:

a. New introductions into such works of pollutants, from any source which would be a new source as defined in CWA § 306 if such source were discharging pollutants directly to state waters;

b. New introductions of pollutants into such works from a source which would be a point source subject to CWA § 301 if it were discharging such pollutants directly to state waters;

c. A substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit; and

d. In terms of character and volume of pollutants any significant source introducing pollutants subject to pretreatment standards under CWA § 307(b), as amended.

Federal authority: CWA §§ 402(b)(8), 204(b); 40 C.F.R. § 122.42, and Part 403.

State statutory and regulatory authority: TEXAS WATER CODE ANN. § 26.047 (Vernon 1988); 30 TEXAS ADMIN. CODE §§ 305.531(1), 315.1.

Remarks: The Commission has adopted 40 C.F.R. § 122.42 and Part 403, by reference, as part of its rules in effect on the date of TPDES program authorization, except 40 C.F.R. § 403.16, and except as follows: Where § 403.11 provides procedures for a public hearing, the Commission shall instead require notice of and hold a public meeting conducted by the Executive Director. The meeting shall be an opportunity for public comment, and shall otherwise follow the procedures described in § 403.11(b)(2) and (c).

The Commission's public meeting is analogous to the EPA public hearing. By contrast, the Commission's public hearing, which may be conducted prior to a decision on whether a permit should be granted, is a full evidentiary proceeding and is the Commission’s procedure analogous to the EPA’s evidentiary hearing.

8. AUTHORITY TO ISSUE NOTICES, TRANSMIT DATA, AND PROVIDE OPPORTUNITY FOR PUBLIC HEARINGS AND JUDICIAL REVIEW

The Commission under state law has authority to comply with the CWA and EPA guidelines for state program requirements regarding public participation in permitting decisions, *see, e.g.,* 40 C.F.R. Part 123. That is, state authority exists to:

a. Notify the public, affected states, and appropriate governmental agencies of proposed actions concerning the issuance of permits;

b. Transmit such documents and data to and from the EPA and to other appropriate governmental agencies as may be necessary;

c. Provide an opportunity for public hearing, with adequate notice thereof, prior to ruling on applications for permits; and

d. Provide an opportunity for judicial review in state court of the final approval or denial of permits.

Federal authority: CWA §§ 101(e), 304(i)(B), 308(b), 402(b)(3)-(b)(6); 40 C.F.R. §§ 123.30, 123.42-.43, 124.10-.12, 124.17, 124.57.

State statutory and regulatory authority: TEXAS GOV'T CODE ANN. Chapter 2001 (Vernon Pamph. 1998); TEXAS WATER CODE ANN. §§ 5.103, 5.105, 5.115, 5.175, 5.351, 26.011, 26.022 (Vernon 1988 & Supp. 1998); 30 TEXAS ADMIN. CODE Chapters 10, 39, 50, 55, 80, 86, 279, 281.

Remarks: In 30 TEXAS ADMIN. CODE § 39.151(e), the Commission has adopted 40 C.F.R. §124.57(a), by reference, as part of its rules in effect on the date of TPDES program authorization. In 30 TEXAS ADMIN. CODE § 55.25(b)(2), the Commission has incorporated 40 C.F.R. § 124.12(a). The Texas-EPA Memorandum of Agreement addresses the requirements of 40 C.F.R. §§ 123.42 and 123.43. Specifically, in the Memorandum of Agreement, the Commission recognizes that if EPA makes a specific objection to a draft permit authorized under § 402(b) of the CWA that is not satisfied by the Commission, exclusive authority to issue the NPDES permit passes to EPA, consistent with § 123.42(b), and the Commission agrees to submit to the EPA copies of all complete permit applications, except those for which permit review has been waived, consistent with § 123.43.

40 C.F.R. §§ 124.10-.12 and 124.17 regulate public notice of permit actions, public comments, requests for public hearings, requests for public meetings, and procedures related to receipt of, consideration of, and response to public comment. The parts of these provisions that must be equivalently treated in the state program are addressed by 30 TEXAS ADMIN. CODE §§ 39.21, 39.23, 39.151, 55.21, 55.25(b)(2), 80.127, and 279.5.

The Commission's rules require that public comment on permitting decisions be considered and responded to by the person or body making the permitting decision. 30 TEXAS ADMIN. CODE § 55.25(b).[6] Before an application may be approved, the Executive Director will prepare a response to all significant public comments on the draft permit that are raised during the public comment period and make the responses available to the public. The response shall specify the provisions of the draft permit that have been changed in response to public comment and the reasons for the changes. If the application is acted on by the Commission without a trial-type contested case hearing, under 30 TEXAS ADMIN. CODE §§ 50.13 or 55.27(a)(1), the Executive Director's response to public comment shall be made available to the public and filed with the chief clerk at least ten days before the Commission acts on the application. The Commission shall consider all public comment in making its decision and shall either adopt the Executive Director's response to public comment or prepare its own response. Pursuant to 30 TEXAS ADMIN. CODE § 55.25, a public meeting will be held when there is a significant degree of public interest in a permit application or whenever required by law. The public comment period is automatically extended to the close of any public meeting. At least 30 days notice of the meeting shall be given in the manner required under 30 TEXAS ADMIN. CODE Chapter 39. A tape recording or written transcript of the public meeting must be made available to the public. 30 TEXAS ADMIN. CODE § 55.25(b)(2).

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6. The part of the public comment system embodied in 30 TEXAS ADMIN. CODE §§ 55.25(b), 80.127(f), and 80.251(b) was lawfully adopted by the Commission on November 5, 1997, pursuant to statutory authority in Code §§ 5.103, 5.105, and 26.011, among other provisions.

Texas law also provides for trial-type, contested case hearings on applications for TPDES permits in some circumstances. If a contested case hearing is held, the public meeting referred to in the paragraph preceding this one shall be conducted as a part of the preliminary hearing under 30 TEXAS ADMIN. CODE § 80.105, unless the Executive Director specifies a different time and place for the public meeting. 30 TEXAS ADMIN. CODE § 55.25(b)(2). All public comment on the application received during the comment period and copies of the Executive Director's responses shall be admitted into the evidentiary record of the contested case hearing, and the parties are allowed to respond to and present evidence on each issue raised in a comment or response. 30 TEXAS ADMIN. CODE § 80.127(f).

After the administrative law judge ("ALJ") presiding over the contested case hearing closes the record, he or she prepares a proposal for decision ("PFD"), which, if it is adverse to any party, must include a statement of the reasons for the proposal and proposed changes to the draft permit recommended by the ALJ in response to public comment. 30 TEXAS ADMIN. CODE § 80.251. If the Commission issues the proposed permit with changes, it may adopt the ALJ's reasons for the proposed changes in response to public comment, or substitute its own reasons.

Judicial review of TPDES permits is available, as follows. If a contested case hearing was held, a party is entitled to judicial review under the authority and procedures of the Texas Administrative Procedure Act ("APA"), TEXAS GOV'T CODE ANN. § 2001.001 *et seq*. (Vernon Pamph. 1998). If a contested case hearing is not held, a person affected by a final ruling, order, or decision of the Commission may file a petition for judicial review under Code § 5.351 within 30 days after the decision is final and appealable. A person seeking judicial review, whether under the APA or Code § 5.351, must have exhausted available administrative remedies, including by complying with Commission rules regarding motions for rehearing or reconsideration, *see, e.g.*, 30 TEXAS ADMIN. CODE §§ 50.19, 50.39, 55.27(g), and 80.271. Requesting or participating in a contested case hearing is not among the exhaustion requirements for judicial review of discharge permit actions under Code § 5.351.

Even a person who failed to file timely public comment, failed to file a timely hearing request, failed to participate in a public meeting held under the rules, and failed to participate in any contested case hearing held under TEXAS ADMIN. CODE Chapter 80 may file a motion for rehearing as provided for in 30 TEXAS ADMIN. CODE §§ 50.19, 55.27(g), or 80.271, or a motion for reconsideration under 30 TEXAS ADMIN. CODE § 50.39, so long as the motion addresses only the changes from the draft permit to the final permit decision, and thus may exhaust administrative remedies for purposes of seeking judicial review regarding those changes. 30 TEXAS ADMIN. CODE § 55.25(b)(3).

A finding by an ALJ or the Commission concerning a person's status as an affected person would not bind a Texas district judge in considering that same person's standing to seek judicial review, under Code § 5.351, of the Commission's action on a discharge permit application.[7] The "affected person" standard set out in Code § 5.115(a) and 30 TEXAS ADMIN. CODE § 55.29 comes into play only in a decision on entitlement to a contested case hearing, whereas § 5.351's availability in the discharge permit context, as noted above, does not depend on a contested case hearing having been requested or participated in. The Office of the Attorney General agrees that it will not rely on or refer to the conclusion of an ALJ or the Commission that a person is not an affected person as a basis to oppose participation by that person in subsequent judicial proceedings brought under Code § 5.351. The Office of the Attorney General may, however, rely on the facts underlying the conclusion in opposing a person's standing in court. Also, when an ALJ or Commission conclusion about affected person status is challenged in the judicial proceeding, the Attorney General may defend that conclusion.

9. AUTHORITY TO PROVIDE ACCESS TO INFORMATION

State law provides authority to make information available to the public consistent with the requirements of the CWA and the guidelines, including the following:

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7. Although the Texas Supreme Court has not expressly adopted the federal standard for individual standing, numerous cases from lower courts of appeal indicate that the two standards are very similar. Please see the discussion of the Texas common law tests of standing starting on page 27.

a. The following information is available to the public for inspection and copying:
   (1) Any TPDES permit, permit application, or form;
   (2) Any public comments, testimony, or other documentation concerning a permit application; and
   (3) Any information obtained under any monitoring, recording, reporting, or sampling requirements or as a result of sampling or other investigatory activities of the state.

b. The state may hold confidential any information (except effluent data, permits, and permit applications) shown by any person to be information which, if made public, would divulge methods or processes entitled to protection as trade secrets of such person.

Federal authority: CWA §§ 304(i)(B), 308(b), 402; 40 C.F.R. Part 2; 40 C.F.R. §§ 2.301-.309, 122.7; 5 U.S.C. § 552; 18 U.S.C. § 1905.

State statutory and regulatory authority: TEXAS GOV'T CODE ANN. Chapter 552 (Vernon 1994 & Supp. 1998); TEXAS WATER CODE ANN. §§ 5.175; 26.0151 (Vernon 1988 & Supp. 1998); 30 TEXAS ADMIN. CODE §§ 1.5, 305.46.

Remarks: State authorities closely parallel federal requirements for public disclosure of information. The Public Information Act, TEXAS GOV'T CODE ANN. Chapter 552 (Vernon Supp. 1998) ("Public Information Act"), like the Federal Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, is a general disclosure statute containing an exemption for trade secrets. Indeed, the Texas trade secrets exemption, § 552.110 of the Public Information Act, is so similar to the federal that the Office of the Attorney General has found federal jurisprudence instructive in its interpretation. *See, e.g.*, Texas Att'y Gen. ORD-504 (1988)(construing what is now TEXAS GOV'T CODE § 552.110.) Consistent with CWA § 304(i)(B), Code § 26.0151(a) requires that the Commission make inspection and investigation reports and any other routinely prepared compliance information publicly available. Similarly, Code § 5.175(b) (Text of section effective upon delegation of NPDES permit authority), providing that all "records, reports, data, or other information obtained relative to or from sources or potential sources of discharges," except for information which would divulge trade secrets, "shall be available to the public," is equivalent to CWA §§ 308(b) and 402(j). Like CWA § 308(b), Code § 5.175 also exempts "effluent data" from its trade secrecy protection provisions.

The state regulations controlling claims of business confidentiality, 30 TEXAS ADMIN. CODE §§ 1.5 and 305.46, are also consistent with and equivalent to 40 C.F.R. § 122.7 and relevant portions of 40 C.F.R. Part 2. 30 TEXAS ADMIN. CODE §§ 305.46(e), (g) and (h) prevent any determination that the names and addresses of permittees or applicants or other information contained in a permit or application is confidential business information, as does 40 C.F.R. § 122.7(b). Moreover, 30 TEXAS ADMIN. CODE § 305.46(c) references FOIA Exemption 4, 5 U.S.C. § 552(b)(4); the Trade Secrets Act, 18 U.S.C. § 1905; and 40 C.F.R. §§ 2.301-.309 as including substantive standards the Commission may apply in resolving claims of business confidentiality. It should be noted that 40 C.F.R. § 2.302(a)(2), containing EPA's definition of "effluent data," is included among those substantive standards.

10. AUTHORITY TO TERMINATE OR MODIFY PERMITS

State law provides authority to terminate or modify permits for cause including, but not limited to, the following:

a. Violation of any condition of the permit (including, but not limited to, conditions concerning monitoring, entry, and inspections);

b. Obtaining a permit by misrepresentation or failure to disclose fully all relevant facts; or

c. Change in any condition that requires elimination of the permitted discharge.

Federal authority: CWA § 402(b)(1)(C); 40 C.F.R. §§ 122.41(f), 122.62, 122.63, 122.64.

State statutory and regulatory authority: TEXAS WATER CODE ANN. §§ 7.302, 26.029(Vernon 1988 & Supp. 1998); 30 TEXAS ADMIN. CODE §§ 50.45, 305.62, 305.64, and 305.66.

Remarks: Code §§ 7.302 and 26.029 (Text of section effective upon delegation of NPDES permit authority) authorize the Commission to revoke a permit for reasons including those listed in 10.a.-c. above. 30 TEXAS ADMIN. CODE § 305.66 states that the Commission may revoke a permit for good cause, including but not limited to the reasons listed in 10.a.-b. above.

30 TEXAS ADMIN. CODE § 305.62 states that the Commission may order an amendment to a permit for good cause, which is described in a non-exclusive list. As Code § 7.302 authorizes the Commission to

revoke a permit based on a change in any condition that requires elimination of the permitted discharge (10.c. above), so the Commission may arguably amend a permit for that reason. Commission rules allow minor amendments to permits under conditions described in 30 TEXAS ADMIN. CODE §§ 305.62 and 305.64, equivalent to those allowed by EPA regulations, 40 C.F.R. § 122.62. The Commission has adopted, by incorporation of full text, 40 C.F.R. § 122.62 (a)-(g) to allow minor amendments to TPDES permits only under the same conditions as specified in 40 C.F.R. § 122.63.

30 TEXAS ADMIN. CODE § 305.62(c)(2)(C) is equivalent to 40 C.F.R. § 122.63 in that it limits minor amendments to TPDES permits to the same conditions as those listed in 40 C.F.R. § 122.63.

11. AUTHORITY TO ENFORCE THE PERMIT AND THE PERMIT PROGRAM

State law provides authority to:

a. Abate violations of:
   (1) Requirements to obtain permits;
   (2) Terms and conditions of issued permits;
   (3) Effluent standards and limitations and water quality standards (including toxic effluent standards and pretreatment standards applicable to dischargers into POTWs); and
   (4) Requirements for recording, reporting, monitoring, entry, inspection, and sampling.

b. Apply sanctions to enforce violations described in paragraph (a) above, including the following:
   (1) Injunctive relief, without the necessity of a prior revocation of the permit;
   (2) Civil penalties;
   (3) Criminal fines for willful or negligent violations; and
   (4) Criminal fines against persons who knowingly make any false statement, representation, or certification in any forms, notice, report, or other document required by the terms of a permit, rule, or order or otherwise required by the state as part of a recording, reporting, or monitoring requirement.

c. Apply maximum civil and criminal penalties and fines which are comparable to the maximum amounts recoverable under CWA § 309 or which represent an actual and substantial economic deterrent to the actions for which they are assessed or levied. Each day of continuing violation is a separate offense for which civil and criminal penalties and fines may be obtained.

Federal authority: CWA §§ 304(a)(2)(C), 309, 402(b)(7), 402(h), 504; 40 C.F.R. §§ 122.2, 123.26, 123.27.

State statutory and regulatory authority: TEXAS GOV'T CODE ANN. Chapter 552; TEXAS WATER CODE ANN. §§ 7.002, 7.032, 7.051, 7.053, 7.066, 7.101, 7.102, 7.103, 7.105, 7.109, 7.141, 7.142-.155, 7.173, 7.187, 7.188, 7.195, 7.196, 7.198, 26.001(25) (Vernon Supp. 1998); TEXAS REV. CIV. STAT. ANN. art. 4447cc (Vernon Supp. 1998); 30 TEXAS ADMIN. CODE §§ 3.2, 70.2, 70.5, 70.51, 80.269.

Remarks: Provisions for civil and criminal penalties apply to all persons, as defined in Code § 26.001(25) (Text of section effective upon delegation of NPDES permit authority) and 40 C.F.R. § 122.2. Code § 26.001(25) (Text of section effective upon delegation of NPDES permit authority) defines person as an individual, association, partnership, corporation, municipality, state or federal agency, or agent or employee thereof.

Code § 7.196 states that a summons shall be served on a private corporation by personally delivering a copy of it to the corporation's registered agent, president, vice-president, or to the Secretary of State, who shall forward it to the defendant corporation. Code § 7.198 provides that a defendant private corporation appears through counsel or its representative, which includes a corporate officer. Subsections (b) and (c) of § 7.198 state that if a corporation does not appear in response to a summons or fails to plead, or if a corporation is absent without good cause at any time during later proceedings, it is considered to be present in person for all purposes.

Code § 7.195(b) provides that no individual may be arrested upon a complaint, indictment, or information against a private corporation. However, this section does not limit the availability of corporate officers as defendants in a criminal suit. It simply states that an individual may not be arrested as the representative of a corporation when the corporation alone is the defendant named in the charging instrument.

12. AUTHORITY FOR PUBLIC PARTICIPATION IN THE STATE ENFORCEMENT PROCESS

Federal authority: CWA § 101(e); 40 C.F.R. §§ 123.27(d), 123.28.

State statutory and regulatory authority: TEXAS GOV'T CODE ANN. Chapter 551; Code §§ 5.177, 7.075, 7.110 (Vernon 1988 & Supp. 1998); 30 TEXAS ADMIN. CODE Chapter 10; *id.* §§ 70.10, 80.109, 80.111, 80.115, 80.254, 80.263.

Remarks: 40 C.F.R. § 123.27(d) requires that the state provide for public participation in state enforcement proceedings by providing intervention as of right in certain civil and administrative actions, or by implementing the three procedures described in § 123.27(d)(2).

Handling of Complaints: Code § 5.177 provides for public participation in state enforcement proceedings, in conformance with § 123.27(d)(2)(i) as follows: If a written complaint is filed with the Commission relating to an entity regulated by the Commission, the Commission must notify the parties to the complaint at least quarterly of the status of the complaint until final disposition of the complaint. This statute assures that the public will be kept regularly apprised of enforcement case status and will have a meaningful opportunity to participate as enforcement cases progress.

Administrative Enforcement Actions: Texas complies with 40 C.F.R. § 123.27(d)(2)(ii) in the administrative context. Under 30 TEXAS ADMIN. CODE § 80.109, in a contested case in which failure to obtain an NPDES permit or violation of an NPDES permit is alleged, any person granted permissive intervention by the ALJ becomes a party. The Executive Director has agreed in the Memorandum of Agreement between the Commission and the EPA that he or she will not oppose intervention by persons having a justiciable interest in circumstances that do not, in his or her opinion, present a risk of undue delay or prejudice to the original parties.

At least two other opportunities for public participation in enforcement are afforded at the administrative level. First, before the evidentiary phase of a contested case hearing, if any, ALJs allow public comment by non-parties. 30 TEXAS ADMIN. CODE § 80.111. Second, decisions on matters like the ones under discussion must be set on the Commissioners' agenda for a final decision in compliance with the Open Meetings Act, TEXAS GOV'T CODE ANN. Chapter 551. Public notice must be given; the public, including non-parties, may

provide written comment; an opportunity also may be afforded to make oral comment at the agenda meeting. *See generally, e.g.,* 30 TEXAS ADMIN. CODE Chapter 10; *id.* § 80.263.

Judicial Enforcement: Texas complies with 40 C.F.R. § 123.27(d)(2)(ii) in the judicial enforcement context. Under Code § 7.110(d), the Office of the Attorney General may not oppose intervention by a person who has standing to intervene as provided by Rule 60, Texas Rules of Civil Procedure.

The MOU between the Commission and EPA provides that the Office of the Attorney General will not oppose intervention by any citizen when permissive intervention may be authorized by statute, rule, or regulation.

Rule 60 and common law doctrines of associational and individual standing create meaningful opportunities for citizen participation in civil penalty enforcement actions in court. In the case of *Guaranty Federal Savings Bank v. Horseshoe Operating Co.,* 793 S.W.2d 652, 657 (Tex. 1990), the Texas Supreme Court outlined the requirements and operation of Rule 60:

> Rule 60 of the Texas Rules of Civil Procedure provides that "[a]ny party may intervene, subject to being stricken out by the court for sufficient cause on the motion of the opposite party . . . ." Tex. R. Civ. P. 60. An intervenor is not required to secure the court's permission to intervene; the party who opposes the intervention has the burden to challenge it by a motion to strike. *See In re Nation*, 694 S.W.2d 588 (Tex. App.--Texarkana 1985, no writ); *Jones v. Springs Ranch Co.*, 642 S.W.2d 551 (Tex. App.--Amarillo 1982, no writ).
>
> Furthermore, under Rule 60, a person or entity has the right to intervene if the intervenor could have brought the same action, or any part thereof, in his own name, or, if the action had been brought against him, he would be able to defeat recovery, or some part thereof. *Inter-Continental Corp. v. Moody*, 411 S.W.2d 578, 589 (Tex. Civ. App.--Houston [1st Dist.] 1966, writ ref'd n.r.e); *Texas Supply Center, Inc. v. Daon Corp.*, 641 S.W.2d 335, 337 (Tex. App.--Dallas 1982, writ ref'd n.r.e.). The interest asserted by the intervenor may be legal or equitable. *Moody*, 411 S.W.2d at 589. Although the trial court has broad discretion in determining whether an intervention should be stricken, it is an abuse of discretion to strike a plea in intervention if (1) the intervenor meets the above test, (2) the intervention will not complicate the case by an excessive multiplication of the issues, and (3) the intervention is almost essential to effectively protect the intervenor's interest. *Moody*, 411 S.W.2d at 589; *Daon Corp*., 641 S.W.2d at 337.

Because an intervenor must have been able to have brought an action originally in order to withstand a motion to strike the plea in intervention, it is necessary to review the Texas law of standing for associations

and individuals. It is also instructive to note the similarities between the standing doctrine as applied by federal courts under Article III of the U.S. Constitution and as applied by Texas state courts.

Texas employs the same standard for associational standing as used by the federal courts in construing standing under Article III of the U.S. Constitution. *Texas Association of Business v. Air Control Board*, 852 S.W.2d 440 (Tex. 1993).

Although the Texas Supreme Court has not expressly adopted the federal standard for individual standing, there are numerous cases from lower courts of appeal that indicate that the two standards are very similar. A person has standing to sue in Texas if:

> he has sustained, or is immediately in danger of sustaining, some direct injury as a result of the wrongful act of which he complains; . . . he has a personal stake in the controversy; . . . the challenged action has caused the plaintiff some injury in fact, either economic, recreational, environmental or otherwise; . . . or he is an appropriate party to assert the public's interest in the matter, as well as his own.

Cedar Chest Funeral Home v. Lashley, 889 S.W.2d 325, 329 (Tex. App.--Dallas 1993, no writ); *Precision Sheet Metal Mfg. Co. v. Yates*, 794 S.W.2d 545, 551(Tex. App.--Dallas 1990, writ denied); *Dresser Industries, Inc. v. Snell*, 847 S.W.2d 367, 376 (Tex. App.--El Paso 1993, no writ); *Billy B., Inc. v. Board of Trustees of the Galveston Wharves*, 717 S.W.2d 156, 158 (Tex. App.--Houston [1st Dist.]1986, no writ). This standard closely follows the federal requirements for individual standing announced in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130 (1992)(to have standing a plaintiff must show an injury in fact, a causal connection between the injury and the action complained of, and that the injury will be addressed by a favorable decision).

It also has long been the law in Texas that "standing consists of some interest peculiar to the person individually and not as a member of the general public." *Hunt v. Bass*, 664 S.W.2d 323 (Tex. 1984); *Mitchell v. Dixon*, 140 Tex. 520, 168 S.W.2d 654 (1943); *Yett v. Cook*, 115 Tex. 205, 281 S.W. 837 (1926); *City of San Antonio v. Stumberg*, 70 Tex. 366, 7 S.W. 754 (1888). This "special injury" rule is not unlike

the limitation on standing employed in the *Defenders of Wildlife* case cited above that requires a concrete and particularized injury by the plaintiff asserting standing.

Notice and Comment On Proposed Settlements: In the administrative and judicial enforcement contexts, Texas complies with 40 C.F.R. § 123.27(d)(2)(iii). That provision requires the state to "[p]ublish notice of and provide at least 30 days for public comment on any proposed settlement of a State enforcement action."

Under 30 TEXAS ADMIN. CODE § 80.254, when the Executive Director and the respondent in an enforcement case that has gone to State Office of Administrative Hearings ("SOAH") have reached an agreed settlement of an enforcement case, they shall submit the agreement to the ALJ in writing. The ALJ shall forward the proposed settlement to the Commission for consideration. If a party to the case dissents from the proposed settlement, the ALJ shall give such party a reasonable time to file comments, and shall forward all timely filed comments to the Commission. After any required public notice and opportunity for comment on proposed settlements (see the next paragraph) and consideration of the record, the Commission may either approve it or disapprove it and remand the case for hearing.

Under Code § 7.075, before the Commission approves an administrative order or proposed agreement to settle an administrative enforcement action, the Commission shall allow the public to comment in writing on the proposed order or agreement. Notice of the opportunity to comment shall be published in the Texas Register not later than the 30th day before the date on which the public comment period closes. The Commission shall consider any written comments and may withdraw or withhold consent to the proposed order or agreement. Code § 7.075 applies to all settlements of administrative enforcement cases, regardless of whether or not they were referred to SOAH.

Under Code § 7.110(a), before the court in a judicial enforcement action signs a judgment or other agreement settling a case, the Office of the Attorney General shall permit the public to comment in writing on the proposed order, judgment, or other agreement. Notice of the comment opportunity will be published in the Texas Register not later than the 30th day before the date on which the public comment period closes.

Code § 7.110(b). The Office of the Attorney General shall promptly consider any written comment and may withdraw or withhold consent to the proposed order, judgment, or other agreement if the comments disclose facts or considerations that indicate that the consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the Commission's statutes, rules, or permits. Code § 7.110(c).

13. AUTHORITY TO ISSUE GENERAL PERMITS

State law provides the authority to issue and enforce general permits in accordance with the federal general permits regulation at 40 C.F.R. § 122.28.

Federal Authority: CWA § 402(a); 40 C.F.R. §§ 122.28, 123.23, and 123.27.

State statutory and regulatory authority: TEXAS WATER CODE ANN. §§ 7.002, 7.032, 7.051, 7.053, 7.066, 7.101, 7.102, 7.103, 7.105, 7.109, 7.141, 7.142-.155, 7.173, 7.187, 7.188, 7.196, 7.198, 26.040 (Vernon 1988 & Supp. 1998); 30 TEXAS ADMIN. CODE Chapter 321; *id*. §§ 70.2, 70. 5, 70.51, 80.269, 332.31 -.38.

Remarks: Code § 26.040 authorizes the Commission to issue general permits. Section 26.040, as well as Chapter 321 of the Commission rules which delineate the criteria and conditions for such discharges, show that the state and federal provisions are equivalent and consistent with federal law. (The category of discharges covered by a general permit under § 26.040 must not include a discharge of more than 500,000 gallons into surface waters during any 24-hour period.) Most significant, 40 C.F.R. § 122.28 is adopted by reference into 30 TEXAS ADMIN. CODE § 321.141, as described in Section 2.a., *supra*.

The types of discharges regulated by Code § 26.040 and 30 TEXAS ADMIN. CODE Chapter 321 meet the criteria of 40 C.F.R. § 122.28(a). In some situations, the state regulations are more stringent than the federal regulations because they prohibit any discharge. Violations of those chapters are also subject to the full range of Commission enforcement actions, pursuant to Chapters 70 and 80 as cited above. (The 1997 legislation amending Code § 26.040 allows the Commission to amend rules promulgated pursuant to that section's old version, to adopt and conform to federal NPDES requirements. *See* Footnote 4.)

14. AUTHORITY TO APPLY CATEGORICAL PRETREATMENT STANDARDS TO INDUSTRIAL USERS OF POTWS

State law provides authority to apply to industrial users of POTWs pretreatment effluent standards and limitations promulgated under Section 307(b) and (c) of the CWA, as amended, including prohibitive discharge standards developed pursuant to 40 C.F.R. § 403.5 (general pretreatment regulations).

Federal authority: CWA §§ 307, 510; 40 C.F.R. Part 403.

State statutory and regulatory authority: TEXAS WATER CODE ANN. § 26.1211 (Vernon Supp. 1998); 30 TEXAS ADMIN. CODE § 315.1

Remarks: The Commission has adopted 40 C.F.R. Part 403 in relevant part, by reference, at 30 TEXAS ADMIN. CODE § 315.1.

15. AUTHORITY TO APPLY PRETREATMENT REQUIREMENTS IN PERMITS FOR POTWS

State law provides authority to apply in terms and conditions of permits issued to POTWs the applicable requirements of Section 402(b)(8) of the CWA, as amended, and 40 C.F.R. Part 403, including:

a. The elements of an approved POTW pretreatment program as required by 40 C.F.R. § 403.8(c);

b. A modification clause requiring that the POTW's permit be modified or, alternatively, revoked and reissued after the effective date for approval of the state pretreatment program to incorporate into the POTW's permit an approved POTW pretreatment program;

c. Prohibitive discharge limitations applicable to industrial users as required by 40 C.F.R. § 403.5;

d. Demonstrated percentages of removal for those pollutants in accordance with the requirements of 40 C.F.R. § 403.7; and

e. A compliance schedule for the development of a POTW pretreatment program as required by 40 C.F.R. § 403.8(d).

Federal authority: CWA §§ 402(b)(1)(A) and (C), 501; 40 C.F.R. §§ 122.44, 122.62, Part 403.

State statutory and regulatory authority: TEXAS WATER CODE ANN. § 26.047 (Vernon 1988); 30 TEXAS ADMIN. CODE §§ 305.62(d), 305.531, and 315.1.

Remarks: The Commission has adopted 40 C.F.R. § 122.44 at 30 TEXAS ADMIN. CODE § 305.531(4) and 40 C.F.R. Part 403 in relevant part, by reference, at 30 TEXAS ADMIN. CODE § 315.1. Modifications and revocation and reissuance regulated by 40 C.F.R. 122.62 are treated equivalently by 30 TEXAS ADMIN. CODE

§ 305.62(d). Commission rules authorize the Executive Director to initiate a permit amendment for reasons equivalent to those requiring revocation and reissuance of an NPDES permit under federal regulations.

16. AUTHORITY TO MAKE DETERMINATIONS ON REQUESTS FOR PRETREATMENT PROGRAM APPROVAL AND REMOVAL AUTHORIZATIONS

State law provides authority to approve or deny:

a. Requests for POTW pretreatment program approval in accordance with the requirements of 40 C.F.R. §§ 403.8(f) and 403.11; and

b. Requests for authority to reflect removals achieved by the POTWs in accordance with the requirements of 40 C.F.R. §§ 403.7, 403.10(f)(1), and 403.11.

Federal authority: CWA §§ 307(b), 402(b); 40 C.F.R. Part 403.

State statutory and regulatory authority: TEXAS WATER CODE ANN. § 26.1211 (Vernon Supp. 1998); 30 TEXAS ADMIN. CODE § 315.1.

Remarks: The Commission has adopted 40 C.F.R. Part 403 in relevant part, by reference, as part of its rules in effect on the date of TPDES program authorization.

17. AUTHORITY TO MAKE DETERMINATIONS ON CATEGORIZATION OF INDUSTRIAL USERS OF POTWS AND ON SUCH USERS' REQUESTS FOR FUNDAMENTALLY DIFFERENT FACTORS VARIANCES

State law provides authority to:

a. Make a determination as to whether or not an industrial user of a POTW falls within a particular industrial subcategory in accordance with the requirements of 40 C.F.R. § 403.6; and

b. Deny or recommend approval of requests for Fundamentally Different Factors variances for industrial users as required by 40 C.F.R. §§ 403.10(f)(1) and 403.13.

Federal authority: CWA §§ 402(b)(1)(A), 402(b)(8); 40 C.F.R. Part 403.

State statutory and regulatory authority: TEXAS WATER CODE ANN. § 26.1211 (Vernon Supp. 1998); 30 TEXAS ADMIN. CODE § 315.1.

Remarks: The Commission has adopted 40 C.F.R. Part 403 in relevant part, by reference, as part of its rules in effect on the date of TPDES program authorization.

18. AUTHORITY TO APPLY RECORDKEEPING, REPORTING, AND MONITORING REQUIREMENTS TO INDUSTRIAL USERS AND POTWS THAT SERVE THEM

State law provides authority to:

a. Require any industrial user of a POTW to:
   (1) Submit the report required by 40 C.F.R. § 403.12(b) which:
      (a) Sets forth basic information about the industrial user (e.g., process, flow);
      (b) Identifies the characteristics and amount of the waste discharged by the industrial user to the POTW; and
      (c) Proposes a schedule by which any technology and operation and maintenance practices required to meet pretreatment standards will be installed;
   (2) Submit the report required by 40 C.F.R. § 403.12(c)(3) which accounts for the industrial user's progress in installing any required pretreatment or operation and maintenance practices;
   (3) Submit the report required by 40 C.F.R. § 403.12(d) following the final compliance date for the applicable pretreatment standard;
   (4) Submit periodic reports on continued compliance with applicable pretreatment standards as required by 40 C.F.R. § 403.12(e); and
   (5) Submit any other reports required under the TPDES or pretreatment regulations or under state law.

b. Require POTWs subject to the requirements of 40 C.F.R. § 403.8(a) to:
   (1) Report on progress in developing an approvable POTW pretreatment program as required by 40 C.F.R. § 403.12(k); and
   (2) Submit any other reports required under the TPDES or pretreatment regulations or under state law.

c. Require POTWs subject to the requirements of 40 C.F.R. § 403.8(a) and all industrial users subject to pretreatment standards to:
   (1) Establish and maintain records as required by 40 C.F.R. § 403.12(o);
   (2) Install, calibrate, use, and maintain monitoring equipment or methods (including, where appropriate, biological monitoring methods) necessary to determine continued compliance with pretreatment standards and requirements;
   (3) Take samples of effluents (in accordance with specified methods at such locations, at such intervals, and in such manner as may be prescribed); and
   (4) Provide other information as may reasonably be required.

Federal authority: CWA §§ 308(a) and (b), 402(b)(2),(9); 40 C.F.R. Chapter 403; *id.* §§ 122.41(i)-(j), 122.48, 123.26(c), 403.7, 403.8, 403.10, 403.12.

State statutory and regulatory authority: TEXAS WATER CODE ANN. §§ 26.014, 26.015, 26.047 (Vernon 1988 & Supp. 1998); 30 TEXAS ADMIN. CODE §§ 305.125(10) and (11), 305.127, 315.1.

Remarks: The Commission has adopted 40 C.F.R. Part 403 in relevant part, by reference, as part of its rules in effect on the date of TPDES program authorization.

The Environmental, Health, and Safety Audit Privilege Act. (*See* discussion p. 40.)

19. AUTHORITY OF THE STATE AND OF POTWS TO ENTER, INSPECT, AND SAMPLE

State law provides authority to enable an authorized representative of the state, and of a POTW with an approved pretreatment program, upon presentation of such credentials as are necessary, to:

a. Have a right of entry to, upon, or through any premises of a POTW or of an industrial user of a POTW in which premises an effluent source is located or in which any records are maintained;

b. At reasonable times have access to and copy any records required to be maintained;

c. Inspect any monitoring equipment or method which is required; and

d. Have access to and sample any discharge of pollutants to state waters or to POTWs resulting from the activities or operations of the permittee or industrial user.

Federal authority: CWA §§ 308(a) and (b), 402(b)(2) and (9); 40 C.F.R. §§ 122.41(i), 123.26(c), Part 403.

State statutory and regulatory authority: TEXAS WATER ANN. Code §§ 26.014, 26.015, 26.047, 26.173 (Vernon 1988 & Supp. 1998); TEXAS REV. CIV. STAT. art. 4447cc (Vernon Supp. 1998); 30 TEXAS ADMIN. CODE §§ 305.125(10) and (11), 305.127, 315.1, 319.1 -.12.

Remarks: The Commission has adopted 40 C.F.R. Part 403 in relevant part, by reference, as part of its rules in effect on the date of TPDES program authorization. 30 TEXAS ADMIN. CODE § 305.125(10) specifies that the reference to observance of a facility's safety rules in Code § 26.014 (Text of section effective upon delegation of NPDES permit authority) is not grounds to limit the Commission's authority to enter any part of a facility, but is merely a description of the Commission's duty to observe appropriate rules and regulations during an inspection.

The Environmental, Health, and Safety Audit Privilege Act. (*See* discussion p. 40.)

20. AUTHORITY REGARDING PROCEDURES, INCLUDING PUBLIC PARTICIPATION, IN RELATION TO POTWS' REQUESTS FOR APPROVAL OF PRETREATMENT PROGRAMS

State law provides authority to comply with the requirements of 40 C.F.R. § 403.11, which concerns procedures for handling POTWs' requests for approval of their pretreatment programs. That is, authority exists for the Commission to:

a. Notify the public, affected states, and appropriate governmental agencies of:
   (1) requests for POTW pretreatment program approval or removal credit authorization; and
   (2) agency action regarding POTW pretreatment programs or POTW removal credit authorization;

b. Make available relevant documents and data, including to EPA and other appropriate governmental agencies;

c. Provide an opportunity for public hearing, with adequate notice thereof, prior to ruling on applications for POTW pretreatment program approval or removal credit authorization; and

d. Ensure that requests for POTW pretreatment program approval and comments received pertaining to those requests are available to the public for inspection and copying.

State law provides authority to make information available to the public, consistent with the requirements of the CWA and General Pretreatment Regulations, including any information obtained under any monitoring, reporting, or sampling requirements or as a result of sampling or other investigatory activities of the state. The state may hold confidential any information (except effluent data) shown by any person to be information which, if made public, would divulge methods or processes entitled to protection as trade secrets of such person. 30 TEXAS ADMIN. CODE § 315.1 provides for public notice of POTWs' requests for pretreatment program approval, and for a public meeting and public comment.

Federal authority: CWA §§ 308(a) and (b), 101; 40 C.F.R. Part 403.

State statutory and regulatory authority: TEXAS WATER CODE ANN. § 5.175 (Vernon 1988); 30 TEXAS ADMIN. CODE Chapters 39, 50 55, and 315.

Remarks: The Commission has adopted 40 C.F.R. Part 403 in relevant part, by reference, as part of its rules in effect on the date of TPDES program authorization. Authority to issue notices, make documents available, and provide an opportunity for public hearings and public access to information is also described in the

discussion of the Texas Public Information Act (formerly Texas Open Records Act) in the Remarks to Section 9.

21. AUTHORITY TO ENFORCE AGAINST VIOLATIONS OF PRETREATMENT STANDARDS AND REQUIREMENTS

State law provides authority to:

a. Enforce against violations by industrial users and POTWs of:
   (1) Permit requirements;
   (2) National categorical pretreatment standards, including the general prohibition against pass through and interference;
   (3) Prohibitive discharge limitations developed in accordance with 40 C.F.R. § 403.5;
   (4) Local limits developed by the POTW; and
   (5) Requirement for recording, reporting, monitoring, entry, inspection, and sampling.

b. Enforce against violations described in paragraph (a) above using enforcement mechanisms which include the following:
   (1) Injunctive relief; and
   (2) Civil and criminal penalties and fines which are comparable to the maximum penalties and amounts recoverable under Section 309 of the CWA or which represent an actual and substantial economic deterrent to the actions for which they are assessed or levied.

Federal authority: CWA §§ 309, 402(b)(7), 402(h); 40 C.F.R. § Part 403.

State statutory and regulatory authority: TEXAS WATER CODE ANN. §§ 7.002, 7.032, 7.051-.075, 7.101-.111, 7.141-.155, 7.173, 7.187-.190, 7.196, 7.198 (Vernon Supp. 1998); 30 TEXAS ADMIN. CODE §§ 3.2, 70.2, 70.5, 70.51, 80.269, and 315.1.

Remarks: The Commission has adopted 40 C.F.R. Part 403 in relevant part, by reference, as part of its rules in effect on the date of TPDES program authorization.

22. CONFLICT OF INTEREST — STATE BOARD MEMBERSHIP

No state board or body which has or shares authority to approve permit applications or portions thereof shall include (or will include, at the time of approval of the state permit program) as a member any person who receives, or during the previous two years has received, a significant portion of his income directly or indirectly from permit holders or applicants.

Federal authority: CWA generally; *id.* § 304(i)(2)(D); 40 C.F.R. § 123.25.

State statutory and regulatory authority: TEXAS WATER CODE ANN. §§ 5.052, 5.122, 5.053, 5.054, 5.059, 5.060 (Vernon 1988 & Supp. 1998); TEXAS GOV'T CODE ANN. Chapter 572 (Vernon 1994 & Supp. 1998); 30 TEXAS ADMIN. CODE Chapter 50; *id.* § 50.33

Remarks: Code § 5.053(b) (Text of section effective upon delegation of NPDES permit authority), provides that:

> In addition to the eligibility requirements in subsection (a) of this section, persons who are appointed to serve on the Commission for terms which expire after August 31, 2001, must comply at the time of their appointment with the eligibility requirements established under 33 U.S.C. Sections 1251-1387, as amended.

CWA § 304(i) says state programs must include a requirement that a member of a board that approves permit applications must not receive, and must not have received during the previous two years, a significant portion of his income directly or indirectly from permit holders or applicants. One of the three commissioners, R.B. "Ralph" Marquez, was confirmed to serve on the Commission on May 5, 1995. During the calendar year 1995, Commissioner Marquez received "a significant portion of income" from such a source but has not since that time. Accordingly, should the Commission receive authorization to administer the NPDES program in 1998, more than two years will have elapsed between the appointment of the only current Commissioner who has ever had a potential conflict with this prohibition and delegation. That is to say, more than two years will have passed since Commissioner Marquez's receipt of income from a permit holder and thus Commissioner Marquez's participation in the TPDES process will not violate CWA § 304(i). Moreover, pursuant to Code § 5.054, Commission members may be removed for failure to maintain the qualifications required for their appointment.

Under Code § 5.122 and 30 TEXAS ADMIN. CODE § 50.33, the Commissioners have delegated to the Executive Director of the Commission the authority to approve uncontested permits. 30 TEXAS ADMIN. CODE § 50.41 provides that the Executive Director may issue TPDES-related approvals only if he or she does not receive, and has not during the previous two years received, a significant portion of income directly or

indirectly from permit holders or applicants. The rule defines "significant portion of income" in the same way as 40 C.F.R. § 123.25 defines it.

As an additional safeguard, Chapter 572 of the Texas Government Code regulates Commissioners' standards of conduct, requires personal financial disclosure, and prohibits conflicts of interest. Section 572.001 makes clear that the intent of the legislature is to place strict limitations on a state officer, which includes a Commissioner and the Executive Director, by setting forth a broad policy prohibiting that officer from having any "direct or indirect interest" (financial or otherwise), or engaging in any business transaction or professional activity, or incurring any obligation of any nature "that is in substantial conflict with the proper discharge of the officer's . . . duties in the public interest." Subchapter B of Chapter 572, § 572.021, requires a state officer to file with the Texas Ethics Commission a verified financial statement under standards set out in that subchapter. Finally, Subchapter C of Chapter 572 provides standards of conduct for state officers and additional specific prohibitions against conflicts of interest.

23. INCORPORATION BY REFERENCE

State law provides authority to incorporate federal legal authority by reference. The incorporation by reference is proper and enforceable under state law and encompasses all of EPA's NPDES regulations which are applicable to state TPDES and pretreatment programs.

State statutory and regulatory authority: TEXAS GOV'T CODE ANN. Chapters 2001, 2002 (Vernon Pamph. 1998); TEXAS WATER CODE ANN. § 5.103 (Vernon 1988 & Supp. 1998); 30 TEXAS ADMIN. CODE § 91.41.

Remarks: TEXAS GOV'T CODE Chapters 2001 and 2002 provide the procedure for adoption of rules by state agencies. The procedure includes publication, in the Texas Register, of the text of the proposed rule and a brief explanation. TEXAS GOV'T CODE § 2002.014 allows omission from the Texas Register of any information the publication of which is cumbersome, expensive, or otherwise inexpedient, if the information is available by the adopting agency on application to it, and if the Texas Register contains a notice stating the general nature of the information and the manner in which a copy may be obtained. TEXAS GOV'T CODE

§ 2001.036(a)(3) provides that if a federal statute or regulation requires state implementation of a rule by a certain date, the rule is effective on that date.

TEXAS GOV'T CODE Chapter 2002 provides for publication in the Texas Administrative Code of all rules adopted by each agency under chapter 2001. Section 2002.052 allows omission of information from the Texas Administrative Code under the circumstances described in § 2002.014 and states that any such exclusion from publication shall not affect the validity of the omitted rule.

Code § 5.103 states that the Commission shall adopt any rules necessary to carry out its powers and duties under state law. This broad grant of authority to adopt "any rules necessary" does not except adoption of regulations, federal or state, by reference as described in Chapters 2001 and 2002 of the Government Code. 30 TEXAS ADMIN. CODE § 91.41 allows state agencies to adopt federal regulations by reference.

24. RECENTLY ENACTED LEGISLATION

a. Private Real Property Rights Preservation Act

Texas Senate Bill 14 (1995) should not affect the Commission's implementation of the Texas NPDES program. Under Government Code § 2007.003(b)(4), the act does not apply to:

> an action, including an action of a political subdivision, that is reasonably taken to fulfill an obligation mandated by federal law or an action of a political subdivision that is reasonably taken to fulfill an obligation mandated by state law.

Permitting and enforcement of NPDES discharges would be subject to this exception because any action taken pursuant to the NPDES program is "taken to fulfill an obligation mandated by federal law," and the provisions of S.B. 14 do not apply to actions taken under that program.

Further, even if § 2007.003(b)(4) did not apply, any action taken under the NPDES program could be covered by the exception contained in § 2007.003(b)(13). That subsection exempts governmental action that is "taken in response to a real and substantial threat to public health and safety; . . . is designed to significantly advance the health and safety purpose; and . . . does not impose a greater burden than is necessary to achieve the health and safety purpose . . . ." The protection of water quality from potential

contamination resulting from NPDES-authorized wastewater disposal would seem to qualify under that provision of S.B. 14 as well.

b. The Environmental, Health, and Safety Audit Privilege Act.

1. Amendments Enacted Pursuant to Agreement with EPA

EPA and the Commission negotiated a set of technical amendments to the Texas Environmental, Health, and Safety Audit Privilege Act ("Audit Act"), TEXAS REV. CIV. STAT. ANN. art. 4447cc (Vernon Supp. 1998), with the purpose of removing any barriers to state assumption of federal programs. *See* letter from Steven A. Herman, Assistant Administrator, Office of Enforcement and Compliance Assurance, U.S. EPA, to Barry R. McBee, Chairman, Commission (March 19, 1997). The 75th Texas Legislature enacted House Bill 3459 to adopt the amendments agreed upon without any other significant changes in the law. The amendments to the Audit Act have been in effect since September 1, 1997, and the Commission implements the Audit Act consistent with the intent of the legislation and the agreement with EPA. EPA has agreed to conclude that the Commission retains adequate authority to enforce the requirements of any authorized or delegated program. *Id.*

2. Provisions of the Act

The Audit Act was passed by the 74th Legislature in 1995 as H.B. 2473 and was amended by the 75th Legislature in 1997 with H.B. 3459. The Act was created to encourage voluntary compliance with environmental and occupational health and safety laws. Audit Act § 2. The law provides two types of incentives: a limited privilege for information compiled in a voluntary audit, and penalty immunity for certain violations that are self-disclosed to the regulatory agency with jurisdiction over the regulated entity. In both cases, the regulated entity must come into compliance in order to take advantage of the incentive.

The privilege created by the Audit Act generally provides that certain information created during a voluntary audit, and contained in the audit report and its attachments, including any legal memoranda discussing the report, and any remedial implementation or tracking plans, are not admissible as evidence or

subject to discovery in a civil or administrative proceeding. Audit Act § 5. However, the physical events of a violation are not privileged. A person who observes a violation may be compelled to testify about the event witnessed. *Id.* To take advantage of the privilege, appropriate efforts to achieve compliance must be promptly initiated and pursued with reasonable diligence after discovery of noncompliance. *Id.* § 7. The privilege does not apply if it is asserted for a fraudulent purpose. *Id.*

In addition, the privilege does not apply to the extent that it is expressly waived by the owner or operator who prepared the audit report or caused the report to be prepared. *Id.* § 6. However, disclosure by the owner or operator or the person for whom the audit report was prepared does not waive the privilege if it is made under the terms of a confidentiality agreement. *Id.* The only persons who may enter into voluntary confidentiality agreements are: 1) a partner or potential partner of the owner or operator of the facility or operation; 2) a transferee or potential transferee of the facility or operation; 3) a lender or potential lender for the facility or operation; 4) a governmental official of a state; or 5) a person or entity engaged in the business of insuring, underwriting or indemnifying the facility or operation. *Id.* If one of those parties violates a confidentiality agreement, that person is liable for damage caused by the disclosure. *Id.* The remedies for breach of a confidentiality agreement are consistent with the law of contracts.

Further, disclosure by the person for whom the audit report was prepared or by the owner or operator to a state governmental official or agency under a claim of confidentiality does not waive the privilege. *Id.* It is an offense punishable by any penalty in TEXAS GOV'T CODE ANN. Chapter 552, for a public entity, public employee or public official to wrongfully disclose such confidential information. *Id.* However, it is an affirmative defense to the clerical dissemination of a privileged audit report that the report was not clearly labeled "COMPLIANCE REPORT: PRIVILEGED DOCUMENT." Thus, the penalty provisions are solely aimed at persons who disseminate information they know is confidential or should know is confidential because it is clearly labeled as such. Federal and state protections provided for individuals who disclose information to law enforcement authorities are explicitly preserved. *Id.*

The following information is expressly defined as non-privileged: (1) any information required by a regulatory agency to be collected, developed, maintained, or reported under a federal or state environmental or health and safety law; (2) information obtained by a regulatory agency through observation, sampling, or monitoring; and (3) information obtained from a source not involved in the preparation of an audit report. Audit Act § 8. Information required as a result of a permit condition is incorporated in exclusion (1) above.

When an audit report is obtained, reviewed or used in a criminal proceeding, the administrative or civil evidentiary privilege created by the Audit Act is not waived for any other purpose. *Id*. § 9. A state regulatory agency may review information included in an audit report without a waiver of the privilege if that information is required to be available under a specific state or federal law; however, it cannot be used in civil or administrative proceedings, and the evidence that derives from the review or use of such information shall be suppressed upon appropriate motion. *Id.*

The Audit Act also provides that a person who promptly and voluntarily discloses, in writing, certain violations discovered in a voluntary audit is immune from administrative and civil penalties. *Id.* § 10. Penalties are defined as "sanction[s]," and do not include a technical or remedial provision ordered by a regulatory authority. *Id*. § 3. Thus, persons may not use the Audit Act to claim immunity from emergency orders and injunctive relief.

A person must give notice to the appropriate regulatory agency of the intent to perform an audit in order to later claim immunity under the Audit Act. *Id.* § 10(g). Notices of the intent to audit are public information, as are disclosures of violations. In order to claim immunity, the person who makes the disclosure must also correct the noncompliance within a reasonable time and must cooperate with the appropriate agency in connection with an investigation of the issues identified in the disclosure. *Id.* § 10(b)(5), (6). The immunity does not apply to a violation that resulted in substantial harm or risk of harm to persons, property or the environment, or in injury or imminent and substantial risk of serious injury to a person at the site; to a repeat offender who has committed significant violations and has not attempted to

correct the noncompliance, so as to create a pattern of disregard; or to violations that result in "substantial economic benefit which gives the violator a clear advantage over its business competitors." *Id.* § 10.

25. STATUS OF ATTORNEY GENERAL AS LEGAL COUNSEL

The undersigned Attorney General of the State of Texas has full authority to represent the Commission in court in all matters pertaining to the state program. The Attorney General is authorized by the Texas Constitution, Article IV, Section 22, to "represent the State in all suits and pleas in the Supreme Court of the State in which the State may be a party . . . and perform such other duties as may be required by law." Interpretive commentary to this section states that the Attorney General is the "chief law officer of the state."

As a matter of practice, all administrative enforcement is handled by the Commission. All civil litigation is handled by the undersigned and other attorneys under his supervision. Criminal investigation can be conducted by the Attorney General. In criminal litigation matters, upon request of the Attorney General, the local prosecuting authority moves the district judge to issue an order appointing the Attorney General as a special prosecutor.

All necessary authorities to support the state "Program Description" have been cited.

Under authorities in effect at the time of this Statement, no outstanding permits issued by the State of Texas for the discharge of pollutants are valid for the purpose of the NPDES created under the CWA. All persons presently in possession of a valid state permit for the discharge of pollutants are required to:

1. Comply with the application requirements specified in 40 C.F.R. Part 122, Subpart B and Part 124, Subpart A; and

2. Comply with permit terms, conditions, and requirements specified in 40 C.F.R. Part 122, Subparts B, C, and D.

_______________________ By ____
Date Dan Morales
Attorney General of Texas